(5)

No. 89-1474

IN THE

Supreme Court of the United States

October Term, 1990

MCDERMOTT INTERNATIONAL, INC.,
Petitioner,

v.

JON C. WILANDER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

What criteria should determine whether a maritime worker is "any seaman" for purposes of the Jones Act, 46 U.S.C. §688(a)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

1. Introduction: Ishmael and Queequeg 2

2. A Brief History of the Jones Act 5

3. The Pre-Jones Act Cases Defining "Seamen" 7

4. This Court's Seaman Status Decisions 12

5. Recent Legislative Activity Bearing On Jones Act Seaman Status 18

6. The Policy Justification For Providing Seamen More Personal Injury Protection Than Other Maritime Workers 19

7. The Virtues of the Fifth Circuit Test for Seaman Status 23

8. The Demerits of the Seventh Circuit Test 25

CONCLUSION 28

APPENDIX A: *Chronological Table of Pre-Jones Act Seaman Status Cases* A-1

APPENDIX B: *Table of Recent Court of Appeals Decisions Denying Seaman Status on the Basis of the Fifth Circuit's Test* A-4

APPENDIX C: *Table of Recent Court of Appeals Decisions Upholding Seaman Status* A-7

TABLE OF AUTHORITIES

CASES **Page**

Aguilar v. Standard Oil Co., 318 U.S. 724, 63 S. Ct. 930 (1943) 20

Allen v. Hallett, 1 F.Cas. 472 (No. 223) (S.D.N.Y. 1849) .. 8

Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 107 S. Ct. 1410 (1987) 18

Bainbridge v. Merchants' & Miners' Transp. Co., 287 U.S. 278, 53 S. Ct. 159 (1932) 18

The Baron Napier, 249 F. 126 (4th Cir. 1918) 7, 9

Barrett v. Chevron, USA, Inc., 781 F.2d 1067 (5th Cir. 1986)(en banc) 23, 24

Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983), *cert. den.*, 464 U.S. 1069 (1984) 21

The Bound Brook, 146 F. 160 (D.Mass. 1906) 14

Bowen v. Shamrock Towing Co., 139 F.2d 674 (2d Cir. 1943) 17

Brown v. ITT Rayonier, Inc., 497 F.2d 234 (5th Cir. 1974) 3

The Buena Ventura, 243 F. 797 (S.D.N.Y. 1916) 9, 13

Butler v. Whiteman, 356 U.S. 271, 78 S. Ct. 734 (1958) 15, 18, 27

The Canton, 5 F.Cas. 29 (No. 2388) (D.Mass. 1858) 9

The Carrier Dove, 97 F. 111 (1st Cir. 1899) 9

Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S. Ct. 501 (1918) 6

Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S. Ct. 173 (1932) 18

Craig v. M/V Peacock, 760 F.2d 953 (9th Cir. 1985) 21, 26, 27

Desper v. Starved Rock Ferry Co., 342 U.S. 187, 72 S. Ct. 216 (1952) 17

Estate of Rainsford v. Washington Island Ferry Lines, 702 F.Supp. 718 (E.D. Wis. 1988) 26

Gahagan Const. Corp. v. Armao, 165 F.2d 301 (1st Cir.), *cert. den.*, 333 U.S. 876 (1948) 17

Gardner v. The New Jersey, 9 F.Cas. 1192 (No. 5233) (D. Pa. 1806) 7

Gianfala v. Texas Co., 350 U.S. 879, 76 S. Ct. 141 (1955) 15, 17, 18, 26

Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990) 23

Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 78 S. Ct. 687 (1958) 15, 17, 18, 26

Gurney v. Crockett, 11 F.Cas. 123 (No. 5874) (S.D.N.Y. 1849) 7

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S. Ct. 1421 (1985) 20

Hoof v. American Fisheries, 284 F. 174 (W.D. Wash. 1922) 3

The Hurricane, 2 F.2d 70 (E.D. Pa. 1924) 9

International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S. Ct. 19 (1926) 12

Jamison v. Encarnacion, 281 U.S. 635, 50 S. Ct. 440 (1930) 12

Johnson v. John F. Beasley Const. Co., 742 F.2d 1054 (7th Cir. 1984), *cert. den.*, 469 U.S. 1211 (1985) 25, 26

The J.S. Warden, 175 F. 314 (S.D.N.Y. 1910) .. 7, 8, 11, 27

Litherland v. Petrolane Offshore Const. Services, 546 F.2d 129 (5th Cir. 1977) 21

Macomber v. Thompson, 16 F.Cas. 337 (No. 8919) (C.C.D. Mass. 1833) 8

Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165 (2d Cir. 1973) 21

Miller v. The Maggie P., 32 F. 300 (E.D. Mo. 1887) 7

The Minna, 11 F. 759 (E.D. Mich. 1882) 8, 9, 10

Mungia v. Chevron Co, USA, 675 F.2d 630 (5th Cir. 1982) 20

The Murphy Tugs, 28 F. 429 (E.D. Mich. 1886) .. 8, 12, 21

The North America, 18 F.Cas. 339 (No. 10,314) (E.D.N.Y. 1872) 9

Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 49 S. Ct. 88 (1928) 12

Norton v. Warner Co., 321 U.S. 565, 64 S. Ct. 747 (1944) 13, 18, 27

The Ocean Spray, 18 F.Cas. 558 (No. 10,412) (D.Ore. 1876) 8, 9, 10

Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) 20, 24

The Osceola, 189 U.S. 158, 23 S. Ct. 483 (1903) 1, 5, 6, 11

Perez v. Marine Transport Lines, 160 F.Supp. 853 (E.D. La. 1958) 14

Presley v. Vessel Caribbean Seal, 709 F.2d 406 (5th Cir. 1983), *cert. den.*, 464 U.S. 1038 (1984) 19

Pure Oil Co. v. Snipes, 293 F.2d 60 (5th Cir. 1961) 20

Sageman v. The Brandywine, 21 F.Cas. 149 (No. 12,216) (D. Mich. 1852) 8

Saylor v. Taylor, 77 F. 476 (4th Cir. 1896) 9

The Sea Lark, 14 F.2d 201 (W.D. Wash. 1926) 9

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946) 20

Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 77 S. Ct. 415 (1957) 3, 14, 17, 26, 27

Sennett v. Shell Oil Co., 325 F.Supp. 1 (E.D. La. 1971) 19

Shaw v. The Lethe, 21 F.Cas. 1194 (No. 12,721) (Adm. Ct. Pa. 1781) 9

Simko v. C&C Marine Maintenance Co., 594 F.2d 960 (3d Cir.), *cert. den.*, 444 U.S. 833 (1979) 25

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South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S. Ct. 544 (1940) 14, 17

Swanson v. Marra Bros., 328 U.S. 1,
66 S. Ct. 869 (1946) 12, 17

The Sultana, 23 F.Cas. 379 (No. 13,602) (D.Mich. 1857) . 8

Tipton v. Socony Mobil Oil Co., 375 U.S. 34,
84 S. Ct. 1 (1963) 16, 17, 18, 27

Trainer v. The Superior, 24 F.Cas. 130 (No. 14,136)
(E.D. Pa. 1834) 7, 8, 9

Uravic v. F. Jarka Co., 282 U.S. 234, 51 S. Ct. 111
(1931) 12

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(2d Cir. 1911) 9

U.S. v. Thompson, 28 F.Cas. 102 (No. 16,492)
(C.C.D. Mass. 1832) 8, 9

Vaz Borralho v. Keydril Co., 710 F.2d 207
(5th Cir. 1983) 19

The Virginia Belle, 204 F. 692 (E.D. Va. 1913) 9, 11

Wallace v. Oceaneering Int'l, 727 F.2d 427
(5th Cir. 1984) 21

The Wanderer, 20 F. 655 (C.C.D. La. 1880) 9

Warner v. Goltra, 293 U.S. 155, 55 S. Ct. 46
(1934) 13, 18, 27

Webb v. Dresser Industries, 536 F.2d 603 (5th Cir. 1976),
cert. den., 429 U.S. 1121 (1977) 22

Wolverton v. Lacey, 30 F. Cas. 417 (No. 17,932)
(N.D. Ohio 1856) 8, 9

STATUTES

38 Stat. 1164 (1915) 6

33 U.S.C. §§ 901-50 (1927) 12

46 U.S.C. §§ 441-45 (1965) 19

46 U.S.C. §688(a) (1920) 1, 5, 6, 18, 19

46 U.S.C. §688(b) (1982) 18

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61 Tul. L. Rev. 379 (1986) 21

116 Cong. Rec. 31998 (Sept. 16, 1970) 18

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(2d ed. 1975) 5, 6

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Hearings on H.R. 247, H.R. 3505, H.R. 12006, and
H.R. 15023 Before the Select Subcomm. on Labor of
the House Comm. on Education and Labor, 92d Cong.,
2d Sess. (1972) 23

Longshoremen's and Harbor Workers' Compensation Act
Amendments of 1972, Hearings on S. 2318, S. 525,
and S. 1547 Before the Subcomm. on Labor of
the Senate Comm. on Labor and Public Welfare, 92d
Cong., 2d Sess. (1972) 23

H. Melville, *Moby Dick* (1851) 5

D. Robertson, *Admiralty and Federalism* (1970) 8

Robertson, *A New Approach To Determining Seaman Status*, 64 Tex.L.Rev. 79 (1985) 3, 13, 17, 20, 24, 25

INTEREST OF AMICUS CURIAE

This amicus curiae brief supports the position of Respondent. Letters on file with the Clerk of this Court show that all parties to this action have consented to its submission.

The Association of Trial Lawyers of America, with about 65,000 members, is composed principally of lawyers whose professional and political concerns center on the rights of injured persons. It tries to work with Congress, the state legislatures, and the courts to insure consistency and continuity in the law affecting the rights of injured persons, including injured seamen. The Association's interest in the present case is persuading the Court to adhere to its earlier decisions defining a "seaman."

SUMMARY OF ARGUMENT

The Jones Act (1920) was passed to overrule this Court's decision in *The Osceola* (1903) denying injured "seamen" a negligence action against their employers. The Act used the term "seamen" the same way *The Osceola* opinion used it. Judicial decisions contemporaneous with *The Osceola* show that "seamen" was generally understood to include *mission seamen* like the present plaintiff-respondent -- i.e., persons such as harpooners on whaling ships whose work on vessels was not centered on navigation or transportation but whose duties were nevertheless essential to the mission of the vessel and the voyage.

This Court's decisions interpreting the Jones Act term "any seaman" have been consistent with the pre-Jones Act jurisprudence in affording seaman status to *mission seamen* (such as offshore drilling barge workers, offshore pile-driving workers, and even handymen on essentially stationary dredges and harbor barges). In order to adopt

the position urged by defendant-petitioner this Court would have to overrule at least three of its previous decisions and disapprove the reasoning and language of a number of others.

All of the Courts of Appeals except the Seventh Circuit (and perhaps the Third) use a test for seaman status that is consistent with this Court's decisions interpreting the Jones Act and with the pre-Jones Act jurisprudence defining "seamen." That test was applied by the court below and should be retained. Congress has repeatedly acknowledged that the courts include *mission seamen* within the Jones Act's protection and has not seen fit to alter or disapprove that interpretation. The prevailing test for seaman status is well designed to afford the special protection of the Jones Act to those workers who confront the "unique hazards" of seaman's service while excluding other types of maritime workers from that protection. The Seventh Circuit's new test, urged by defendant-petitioner, would be demonstrably inferior in that respect. Adopting the Seventh Circuit's test--which cannot be reconciled with the pre-Jones Act jurisprudence defining "seamen" nor with this Court's decisions interpreting the Jones Act--would entail a radical change in the American maritime law, a profound departure from the "spirit of liberality" traditionally associated with the conception of seamen as "wards of the admiralty," and a significant detriment to maritime workplace safety.

ARGUMENT

1. Introduction: Ishmael and Queequeg.

A seaman injured in the course of employment may maintain a negligence action against the employer, whereas maritime workers who do not qualify as seamen are

normally restricted to remedies under workers' compensation statutes. "Determining the injured worker's status [as a seaman *vel non*] thus assumes paramount importance in a high percentage of the maritime personal injury and death cases that reach the courts."[1] Setting forth useful criteria for determining which maritime workers qualify as seamen is not a simple undertaking; "the myriad circumstances in which men go upon the water confront courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seaman to the land-based longshoreman."[2] Nonetheless, it is helpful to look for the bands on the spectrum. A vessel making a whaling voyage, for example, would likely have been served by four types of workers who might plausibly seek classification as seamen:

(a) *pure sailors*: those whose primary duties required them to "'hand, reef, and steer' [the vessel]--mariner[s] in the full sense of the word";[3]

(b) *support seamen*: those whose primary duties were for the support and nurture of the mariners and the vessel--e.g., the cook, carpenter, ship's doctor, cabin boy--"men [whose] actual jobs [had] nothing to do with making the vessel move [but who did] contribute to the functioning of the vessel *as a vessel*--as a means of transport on water;"[4]

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[1]Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 83 (1985).

[2]Brown v. ITT Rayonier, Inc., 497 F.2d 234, 236 (5th Cir. 1974).

[3]Hoof v. American Fisheries, 284 F. 174, 176 (W.D. Wash. 1922).

[4]Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 377 n.5, 77 S. Ct. 415, 419 n.5 (1957)(Harlan, J., dissenting)(emphasis in original).

(c) *mission seamen*: the harpooners and coopers--workers whose principal duties involved neither "handing, reefing and steering" nor the nurture of those who did, but whose skills were nevertheless indispensable to the whaling vessel's mission as whaler;[5] and

(d) longshoremen, repairmen, and other harbor workers--land-based workers who serviced the vessel while it was moored or anchored in sheltered waters, and who remained ashore when the vessel went to sea.

The test for seaman status that emerges from this Court's relevant decisions (and that was applied by the court below) would treat the workers in the first three categories as seamen, excluding the fourth.

Defendant-petitioner urges the Court to adopt a new and much more restrictive test, one that would reliably include only the first group of workers (and arguably sometimes members of the second[6]) in the seaman category. Petitioner's test would flatly exclude the third group (into which the present plaintiff-respondent falls).

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[5]In practice there was overlap among categories (a), (b), and (c). Support seamen and mission seamen would sometimes perform duties identical to pure sailors. On a freighter, a cook and a doctor would be support seamen; on a passenger liner, the same cook and doctor would be primarily mission seamen. A cooper on a whaling voyage would be a support seaman when concerned with the ship's water barrels and a mission seaman in his principal function of dealing with the ship's receptacles for whale oil. This functional overlap is itself an argument for an expansive test for seaman status; otherwise workers would be walking in and out of the coverage of the seamen's protections many times throughout the working day. Among other things, this would spawn a large number of niggling litigation points, and it would inordinately complicate the typical shipowner-employer's necessary insurance arrangements.

[6]See text and notes 93-95, *infra*.

Thus the present case calls upon the Court to choose between retaining the prevailing law on seamen's rights and adopting a new test, one that would accord Ishmael full rights as a seaman while relegating Queequeg[7] to landlubber status.[8]

2. *A Brief History of the Jones Act.*[9]

America's leading admiralty treatise demonstrates that "[t]he only purpose of the [1920] Jones Act was to remove the bar [to negligence suits by injured seamen against their employers] created by [this Court's 1903 decision in] *The Osceola*."[10] In *The Osceola* this Court (in an opinion by Justice Henry Billings Brown) had held:

> 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of

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[7]See H. Melville, *Moby Dick* (1851). From the standpoint of the whaling venture (if not the novel) Ishmael, a pure sailor, would have been easily replaced. Queequeg and the Pequod's other "harpooneers" -- mission seamen -- would have been very difficult to replace; while they were not aboard the vessel for nautical purposes, their skills were indispensable to the whaling mission. And they confronted the same dangers as Ishmael, plus some unique sea perils known only to harpooners.

[8]See Brief for Petitioner pp. 21-24 (arguing that plaintiff has no rights under maritime law, the Longshore Act, or the Outer Continental Shelf Lands Act). Presumably in petitioner's view plaintiff's rights would have to come from the Louisiana worker's compensation statute or the laws of Qatar.

[9]41 Stat. 1007 (1920), 46 U.S.C.A. §688(a).

[10]G. Gilmore and C. Black, *The Law of Admiralty* §6-21, pp. 328-29 (2d ed. 1975).

another member of the crew beyond the expense of [their] maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.[11]

The Jones Act was Congress's second effort to change the rule of *The Osceola*. The first effort--a 1915 statute providing that "in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority"[12] --was eviscerated by this Court's decision in *Chelentis v. Luckenbach S.S. Co.*[13] In response to *Chelentis* Congress passed the Jones Act--section 33 of the Merchant Marine Act of 1920--giving "any seaman who shall suffer personal injury in the course of his employment" a negligence action based on the principles of the Federal Employers' Liability Act. The Act does not define the term "any seaman," and there is no formal legislative history that would help define it. Given the Act's genesis, it is plain that Congress meant to use the term "seamen"in whatever way the courts had been using it.

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[11]189 U.S. 158, 175, 23 S. Ct. 483, 487 (1903).

[12]Seamen's Act March 4, 1915, c. 153, §20, 38 Stat. 1164, 1185 (1915).

[13]247 U.S. 372, 38 S. Ct. 501 (1918). See the criticism of *Chelentis* in Gilmore & Black, *supra* note 10, §6-20, pp. 325-26.

3. The Pre-Jones Act Cases Defining "Seamen".

The meaning of "seamen" in the pre-Jones Act jurisprudence is well illustrated by a decision of the Fourth Circuit Court of Appeals affirming an award of damages under the 1915 statute during its brief lifetime. In *The Baron Napier*[14] the successful seaman plaintiff was a "muleteer" on a British steamship transporting mules for the Allies from Newport News to Egypt. Although the muleteer's "duties had only to do with the care of the mules, and were in no way connected with the navigation of the ship",[15] no one doubted that he was a seaman.

As *The Baron Napier* shows, the pre-Jones Act cases routinely treated *mission seamen* as full-fledged seamen at law, whether or not such men had incidental navigational duties. Isolated pre-1850 decisions denying libels for seaman's wages by a ship's surgeon,[16] musicians on a floating museum,[17] and a ship-keeper[18] are readily distinguishable. These cases were instances of reliance on restrictive and artificially narrow English precedents;[19]

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[14]249 F. 126 (4th Cir. 1918).

[15]*Id.* at 127.

[16]Gardner v. The New Jersey, 9 F. Cas. 1192 (No. 5233) (D. Pa. 1806).

[17]Trainer v. The Superior, 24 F. Cas. 130 (No. 14,136) (E.D. Pa. 1834).

[18]Gurney v. Crockett, 11 F. Cas. 123 (No. 5874) (S.D.N.Y. 1849).

[19]Both *Gardner* (9 F. Cas. at 1194) and *Gurney* (11 F. Cas. at 124) explicitly relied on the English precedents. Later cases tying the early denials of seaman status to the discredited English view of admiralty jurisdiction include Miller v. The Maggie P., 32 F. 300, 301 (E.D. Mo.

these precedents were fully rejected by United States courts, across the board, by the close of the 19th century.[20] The overwhelming bulk of the pre-Jones Act cases were quite liberal in defining "seamen". In cases spanning the period 1781-1926[21] United States admiralty courts accorded seaman status to bartenders,[22] cabin boys,[23] carpenters,[24] chambermaids,[25] clerks,[26] cooks,[27] coopers,[28] divers,[29]

1887), and The J.S. Warden, 175 F. 314, 315 (S.D.N.Y. 1910).

[20]See D. Robertson, *Admiralty and Federalism* 28-64, 104-122 (1970).

[21]Summaries of these cases are set forth in chronological order in Appendix A, *infra*.

[22]The J.S. Warden, *supra* note 19.

[23]See The Ocean Spray, 18 F. Cas. 558, 560 (No. 10,412) (D. Ore.1876).

[24]See U.S. v. Thompson, 28 F. Cas. 102, 102 (No. 16,492) (C.C.D. Mass. 1832) (Story, J.); Trainer v. The Superior, *supra* note 17, 24 F. Cas. at 131; Wolverton v. Lacey, 30 F. Cas. 417, 418 (No. 17,932) (N.D. Ohio 1856).

[25]See The Minna, 11 F. 759, 760 (E.D. Mich. 1882).

[26]The Sultana, 23 F. Cas. 379 (No. 13,602)(D. Mich. 1857).

[27]Allen v. Hallett, 1 F. Cas. 472 (No. 223) (S.D.N.Y. 1849); Sageman v. The Brandywine, 21 F. Cas. 149 (No. 12,216) (D. Mich. 1852).

[28]U.S. v. Thompson, *supra* note 24 (Story, J.); Macomber v. Thompson, 16 F. Cas. 337 (No. 8919)(C.C.D. Mass. 1833)(Story, J.).

[29]The Murphy Tugs, 28 F. 429 (E.D. Mich. 1886) (Henry B. Brown, J.).

doctors,[30] dredge workers,[31] engineers,[32] firemen,[33] fishermen,[34] harpooners,[35] horsemen,[36] masons,[37] muleteers,[38] musicians,[39] pursers,[40] radio operators,[41] seal hunters,[42] stewards,[43] and waiters.[44] These *support seamen*

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[30]Shaw v. The Lethe, 21 F. Cas. 1194 (No. 12,721) (Adm. Ct. Pa. 1781). See also U.S. v. Thompson, *supra* note 24, 28 F. Cas. at 102 ; Trainer v. The Superior, *supra* note 17, 24 F. Cas. at 131.

[31]Saylor v. Taylor, 77 F. 476 (4th Cir. 1896); The Hurricane, 2 F.2d 70 (E.D. Pa. 1924).

[32]The Virginia Belle, 204 F. 692 (E.D. Va. 1913).

[33]The North America, 18 F. Cas. 339 (No. 10,314) (E.D.N.Y. 1872).

[34]The Minna, *supra* note 25 (Henry B. Brown, J.); The Carrier Dove, 97 F. 111 (1st Cir. 1899).

[35]See The Ocean Spray, *supra* note 23, 18 F. Cas. at 560.

[36]U.S. v. Atlantic Transport Co., 188 F. 42 (2d Cir. 1911).

[37]The Canton, 5 F. Cas. 29 (No. 2388) (D. Mass. 1858).

[38]The Baron Napier, *supra* note 14.

[39]The Sea Lark, 14 F.2d 201 (W.D. Wash. 1926).

[40]The Wanderer, 20 F. 655 (C.C.D. La. 1880).

[41]The Buena Ventura, 243 F. 797 (S.D.N.Y. 1916).

[42]The Ocean Spray, *supra* note 23.

[43]Smith v. The Pekin, 22 F. Cas. 620 (No. 13,090) (E.D. Pa. 1831); Wolverton v. Lacey, *supra* note 24.

and *mission seamen* served on vessels of all kinds. Some of them had nautical duties, but many did not.[45]

Some of the opinions were eloquent on the reasons for adopting a broad view of the meaning of "seaman." In the seal hunter case, Judge Deady stated:

> It is admitted that such persons as surgeons, carpenters, cooks, stewards and cabin-boys are considered mariners. But it is claimed that this is so for the reason that these persons all aid in the navigation and preservation of the vessel. But I think the better reason is found in the fact that they are *co-laborers in the leading purpose of the voyage*. * * * Without these sealers the voyage must have been profitless, because the purpose of it could not have been accomplished. * * * [I]t would be impossible to give any sound reason why the cook, or even the sailors, on this vessel should have a lien upon her for their wages, and the sealers, upon who mainly depended the success of the voyage, should not.[46]

In upholding seaman status for a bartender in 1910, Judge Learned Hand distinguished the early restrictive cases on seaman status as reflecting the discredited English view and stated:

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[44]See The Minna, *supra* note 25, 11 F. at 760.

[45]In The Ocean Spray, *supra* note 23, there was evidence that the seal hunters had "helped make and reef sail, heave the anchor and clear decks." 18 F. Cas. at 560. The court said that was irrelevant on the seaman status inquiry: "[E]ven if it be admitted that the libellants shipped and served as sealers only, they ought to be deemed mariners." *Id.*

[46]*Id.*

> I can see in principle no reason why there should be an artificial limitation of [seamen's] rights to those engaged in the navigation of the ship, to the exclusion of others who equally *further the purposes of the voyage....*"[47]

Several key opinions were written by Judge Henry Billings Brown, who (as Mr. Justice Brown) later wrote *The Osceola*.[48] In The Minna[49] (in which he held that a fisherman who "took no part in the navigation of the vessel"[50] was a seaman) Judge Brown mentioned the early restrictive view of seaman status and said the "sounder principle" was exemplified by cases like the seal hunter case:

> [A]ll hands employed upon a vessel, except the master, are entitled to a lien if their services are *in furtherance of the main object of the enterprise* in which she is engaged. Any other rule would put large classes of persons employed upon steam-boats outside the pale of admiralty law. * * * [I]f men should engage upon a whaling voyage solely for their skill in finding or catching whales, or trying out oil, they would be regarded as mariners, and be entitled to the same remedies as the crew, *though they took no part in the navigation of the ship*. The

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[47]The J.S. Warden, *supra* note 19, 175 F. at 315; emphasis supplied.

[48]Of Judge/Justice Brown it has been stated: "No higher authority can be found respecting maritime matters." The Virginia Belle, *supra* note 32, 204 F. at 694.

[49]*Supra* note 25.

[50]11 F. at 759.

> test is whether the *services are for the benefit of a vessel engaged in commerce and navigation.*[51]

In The Murphy Tugs[52] Judge Brown held that a diver was a seaman and stated:

> All hands employed upon a vessel, except the master, [are] entitled to a lien [for seamen's wages], *if their services were in furtherance of the main object of the enterprise in which she was engaged.*[53]

These authoritative statements by the same judge who wrote the opinion that directly produced the Jones Act term "any seaman" ought to confirm beyond any question that *mission seamen* were meant to be included.

4. This Court's Seaman Status Decisions.

Seven years after enacting the Jones Act Congress passed the Longshore and Harbor Workers' Compensation Act,[54] which restricts maritime workers other than the "master or member of a crew of any vessel"[55] to a workers' compensation remedy. In *Swanson v. Marra Bros.* this Court

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[51] *Id.* at 760; emphasis supplied.

[52] *Supra* note 29.

[53] 28 F. at 431; emphasis supplied.

[54] Pub.L.No. 69-803, ch. 509, 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-950. In the interval this Court had treated longshoremen as Jones Act seamen. See International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S. Ct. 19 (1926); Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 49 S. Ct. 88 (1928); Jamison v. Encarnacion, 281 U.S. 635, 50 S. Ct. 440 (1930); Uravic v. F. Jarka Co., 282 U.S. 234, 51 S. Ct. 111 (1931).

[55] 33 U.S.C. §902(3).

held that the Jones and Longshore Act are mutually exclusive remedy systems, such that the effect of the Longshore Act was to define the Jones Act term "any seaman" to mean a "master or member of a crew of any vessel."[56] Consequently the analysis in most of this Court's seaman status decisions is framed in terms of whether the injured worker was a "member of a crew of any vessel." This Court's seaman status jurisprudence consists of the *Haverty* line of cases,[57] *Swanson*, five additional full opinions, and four per curiam decisions. They add up to a "very expansive" concept of seaman status.[58]

In *Warner v. Goltra*, Justice Cardozo (for a unanimous Court) cited a "policy of liberal construction" of the Jones Act in aid of the conclusion that a tugboat master was a Jones Act seaman.

> In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage.' [Citing *The Buena Ventura*, *supra* note 41.][59]

The Court was again unanimous in *Norton v. Warner Co.* in holding that a general handyman who lived and worked aboard a barge, performing work connected with its maintenance and movement, was a seaman as a matter of law.

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[56] 328 U.S. 1, 7, 66 S. Ct. 869, 872 (1946).

[57] See note 54, *supra*.

[58] Robertson, *supra* note 1, 64 Tex. L. Rev. at 85.

[59] 293 U.S. 155, 157, 55 S. Ct. 46, 47 (1934).

> Certainly members of the crew are not confined to those who can 'hand, reef and steer'. Judge Hough pointed out in *The Buena Ventura* [*supra* note 41] that 'every one is entitled to the privileges of a seaman who, like seamen, at all times contribute to the labor about the operation and welfare of the ship when she is upon a voyage.' We think that 'crew' must have at least as broad a meaning under the Act.[60]

In *Senko v. La Crosse Dredging Corporation* six members of the Court agreed that a jury verdict of seaman status should be upheld on behalf of a handyman who worked on a dredge securely anchored in a navigable river. The *Senko* plaintiff's work had been confined to maintaining the dredge while it was stationary--it had never moved during his tenure of employment--but he would have been involved had it ever moved. The core of *Senko* was characterization of the seaman status issue as a question of fact:

> Our holding [in *South Chicago Coal & Dock Co. v. Bassett* [*infra* note 67] that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding

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[60]321 U.S. 565, 572, 64 S. Ct. 747, 751 (1944) (citations omitted). An ostensibly limiting phrase with which the *Norton* Court was concerned--"naturally and primarily on board the vessel to aid in her navigation"--was evidently an inadvertent misquotation. In The Bound Brook, 146 F. 160, 164 (D. Mass.1906), a related idea had originated in this form: "When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangements under which they are on board." See Judge J. Skelly Wright's demonstration in Perez v. Marine Transport Lines, 160 F. Supp. 853, 855 (E.D. La. 1958), that the "aid of navigation" test has always been "loose language."

> negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."[61]

In *Gianfala v. Texas Co*,[62] the injured worker was a member of an oilfield drilling crew assigned to a submersible drilling barge that was submerged and firmly secured to the bottom of a navigable bay. The barge ordinarily moved about once a year and the worker had never had any duties connected with its movement. The Fifth Circuit held that the worker was not a seaman. This Court granted certiorari, summarily reversed the Fifth Circuit, and ordered the reinstatement of a judgment for plaintiff based on a jury verdict that the worker was a seaman.

The plaintiff in *Grimes v. Raymond Concrete Pile Co.* was a pile driver. He worked ashore constructing a "Texas Tower"--a platform designed as a permanent offshore radar installation. He then lived and worked on the tower as it was towed 110 miles out to sea, and was hurt while thereafter engaged in the pile-driving operations necessary to secure the tower to the ocean floor. The First Circuit held as a matter of law that he was not a seaman. This Court granted certiorari and summarily reversed, stating that "the petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel."[63]

In *Butler v. Whiteman*, the tug on which plaintiffs'

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[61]352 U.S. 370, 374, 77 S. Ct. 415, 417 (1957).

[62]350 U.S. 879, 76 S. Ct. 141 (1955).

[63]356 U.S. 252, 253, 78 S. Ct. 687, 689 (1958).

decedent was working when he drowned had been immobilized at defendant's dock for at least ten months at the time of the injury. During all that time the deceased worker--whose employer owned a wharf, a barge, and the tug--had been doing odd jobs on the wharf. On the morning of the accident he was assigned to clean the tug's boilers and somehow fell overboard. The Fifth Circuit held that as a matter of law he was not a seaman. This Court granted certiorari and summarily reversed, stating that the evidence would support a jury finding that "the petitioner's decedent was a seaman and member of a crew of the tug within the meaning of the Jones Act...."[64]

Tipton v. Socony Mobil Oil Co. presented the seaman status issue tangentially. An oil field roughneck assigned to an offshore fixed platform, who sometimes worked on a nearby drilling barge, lost a Jones Act jury trial. His appeal to the Fifth Circuit urged that the trial judge had erred by admitting evidence of his accepting Longshore Act benefits. The Fifth Circuit rejected the appeal, concluding that this was harmless error. This Court granted certiorari and summarily reversed the Fifth Circuit, holding that "the jury was led to place undue emphasis on the availability of compensation benefits in determining the ultimate question of whether the petitioner was a seaman within the Jones Act."[65] Like this Court's other seaman status decisions, *Tipton* shows great solicitude for the rights of injured workers and a firm commitment to assigning the status issue to juries in all but the most marginal cases.

The foregoing seven decisions are indisputably expansive on the seaman status issue. Note that at least

[64]356 U.S. 271, 78 S. Ct. 734 (1958).

[65]375 U.S. 34, 37, 84 S. Ct. 1, 3 (1963).

four of them--*Senko*, *Gianfala*, *Grimes*, and *Tipton*--characterized mission seamen like the present plaintiff-respondent as Jones Act seamen. Only three decisions of this Court have ever concluded against seaman status, and these are readily distinguishable. *Swanson v. Marra Bros.*, *supra* note 56, held that an ordinary longshoreman was not a seaman. *Desper v. Starved Rock Ferry Co.*[66] held that a young man hired to repair sightseeing motorboats while they were blocked up on land for the winter was not a seaman. *South Chicago Coal & Dock Co. v. Bassett* held that a worker whose main duties centered on facilitating the flow of coal from a fuelling lighter to river steamboats was not excluded by the Longshore Act's "member of a crew of any vessel" language from the worker's compensation benefits he sought. In reaching that conclusion the *Bassett* Court cited the worker's lack of navigational duties but cautioned that it was construing *only* the Longshore Act and not "other statutes having other purposes."[67] *Bassett* was evidently premised on the view that some workers may qualify for benefits under either the Jones Act or the Longshore Act, at their option; note that it was decided before *Swanson v. Marra Bros.*, *supra* note 56, had held that the two statutes are mutually exclusive in their coverages.[68]

Like its decisions on other aspects of the Jones Act, this Court's seaman status decisions reflect the "spirit of

[66]342 U.S. 187, 72 S. Ct. 216 (1952).

[67]309 U.S. 251, 260, 60 S. Ct. 544, 549 (1940).

[68]For development of the view that *Bassett* is not a decision denying Jones Act seaman status, see Robertson, *supra* note 1, 64 Tex. L. Rev. at 86-88. Cases sharing that view of *Bassett* include Gahagan Const. Corp. Armao, 165 F.2d 301, 307 (1st Cir.), *cert. den.*, 333 U.S. 876 (1948), and Bowen v. Shamrock Towing Co., 139 F.2d 674, 675-76 (2d Cir. 1943).

liberality" that has always been associated with that statute and with seamen's rights generally.[69] In order to adopt the position urged by defendant-petitioner in the present case, this Court would have to forsake that spirit. More specifically, adopting defendant-petitioner's position would require the Court to completely disavow its decisions in *Senko*, *Gianfala*, and *Grimes*, as well as entailing radical surgery on the meaning of *Norton*, *Butler*, *Warner*, and *Tipton*.

5. Recent Legislative Activity Bearing On Jones Act Seaman Status.

a. The Tower Bill: On several occasions during the early 1970s Senator John Tower of Texas introduced legislation that would have taken mission seamen like the present plaintiff-respondent out of the category of seamen and placed them exclusively under the Longshore Act.[70] Despite full awareness of the dozens of judicial decisions treating offshore oil and gas workers as seamen, Congress never saw fit to enact such legislation.

b. The 1982 Amendment to the Jones Act: The original Jones Act is now 46 U.S.C. §688(a). A new subsection, 46 U.S.C. §688(b), was added in 1982 to preclude many alien workers engaged in oil and gas operations off the shores of foreign countries from receiving injury benefits under American law. The

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[69]See Cortes v. Baltimore Insular Line, 287 U.S. 367, 375-77, 53 S. Ct. 173, 176 (1932); Bainbridge v. Merchants' & Miners' Transp. Co., 287 U.S. 278, 282, 53 S. Ct. 159, 160 (1932). Cf. Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562, 107 S. Ct. 1410 (1987).

[70]See 116 Cong. Rec. 31998 (Sept. 16, 1970); 117 Cong. Rec. 10490-91 (April 15, 1971).

legislative history[71] shows that Congress was fully aware that American oil and gas workers assigned to offshore structures and vessels often qualify as Jones Act seamen. Yet the 1982 Congress showed no disposition to alter any feature of American maritime law except its applicability to some alien offshore workers.

c. The Oceanographic Research Vessels Act.[72] "Vessels engaged in oceanographic research are operated by a crew that performs the duties usually assigned to seamen. These vessels also carry a complement of scientific personnel who are engaged in research and have nothing to do with the navigation or maintenance of the vessel."[73] Under the *mission seaman* jurisprudence discussed above, many of these scientists would have been classified as Jones Act seamen. In 1965 Congress enacted the Oceanographic Research Vessels Act (ORVA), one section of which provides that specified "scientific personnel" are not to be considered Jones Act seamen.[74] This Congressional action shows that Congress was aware of the inclusion of mission seamen within the coverage of the Jones Act *and* acquiesced in that jurisprudence except for the narrow "scientific personnel" exception specifically carved out by ORVA.

6. The Policy Justification For Providing Seamen More Personal Injury Protection Than Other Maritime Workers.

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[71]The legislative history is set forth in some detail in Vaz Borralho v. Keydril Co., 710 F.2d 207, 209-13 (5th Cir. 1983).

[72]46 U.S.C. §§ 441-445.

[73]Sennett v. Shell Oil Co., 325 F. Supp. 1, 3 (E.D. La. 1971).

[74]46 U.S.C. §444. See Presley v. Vessel Caribbean Seal, 709 F.2d 406 (5th Cir. 1983), *cert. den.*, 464 U.S. 1038 (1984).

Congress has made the broad policy decision to protect seamen more fully than other maritime workers. To the extent that it has left "seamen" undefined it invites the courts to resort to that underlying policy in providing definitional lines. Repeatedly this Court and others have justified special doctrines protecting seamen by reference to the "unique hazards" of seamen's work.[75] Seamen's work exposes them to unique hazards of two types: those that might be lumped as "perils of the sea"[76] and those associated with the movement of vessels.

Four points need to be made about these unique seamen's hazards. First, mission seamen like the present plaintiff-respondent (and like Queequeg) confront these dangers every bit as severely, and often even more severely, than do more traditional mariners. Justice Marshall has noted this feature of offshore oil and gas work.[77] It has also

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[75]Aguilar v. Standard Oil Co., 318 U.S. 724, 727, 63 S. Ct. 930, 932 (1943). For full development and citations to the decisional law justifying the Jones Act by reference to the unique seamen's hazards--perils of the sea and vessel-movement dangers--see Robertson, *supra* note 1, 64 Tex. L. Rev. at 80-81, 92, 96-100, 118-120.

[76]Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104, 66 S. Ct. 872, 882 (1946) (Stone, C.J., dissenting); Mungia v. Chevron Co., USA, 675 F.2d 630, 633 (5th Cir. 1982) ("[T]he 'peril of the sea' . . . is the foundation of Jones Act coverage") (quoting Offshore Co. v. Robison, 266 F.2d 769, 771 (5th Cir. 1959).

[77]See Herb's Welding, Inc., v. Gray, 470 U.S. 414, 448-49, 105 S. Ct. 1421, 1440 (1985) (Marshall, J., dissenting from decision denying Longshore Act coverage to fixed-platform workers injured within a marine league from shore). See also Offshore Co. v. Robison, *supra* note 76, 266 F.2d at 780; Pure Oil Co. v. Snipes, 293 F.2d 60, 64-67 (5th Cir. 1961); Alston, *Admiralty Jurisdiction and Fixed Offshore Drilling Platforms: A Radical Plea Reconsidered*, 28 Loyola L. Rev. 379, 380, 408-09, 412-13 (1982). Even the strongest opponents of Jones Act coverage for offshore oil and gas workers are impressed with the great dangerousness of this work. See, e.g., Beer, *Keeping Up With The Jones Act*, 61 Tul. L. Rev. 379, 391, 395, 406 (1986).

been noted respecting deep-sea diving,[78] specialized anchor-handling work,[79] and the work of many other types of mission seamen.[80]

Second, the present plaintiff-respondent was hurt by a peril of the sea. The injury involved muddled radio communications among three vessels involved in defendant's operations, and occurred as follows (see Tr. July 26, 1988, Vol I, pp. 73, 140; Vol. II, pp. 293, 294, 306, 316-17; Vol. III, pp. 477, 478, 537, 540): Plaintiff was assigned to and working aboard the GATES TIDE, tied up at a small platform scheduled for painting. The JARMAC-8 was tied up to a larger platform eight or nine miles away across open water. Somewhere between the two (apparently not visible from either) was the DB-9. Captain Ronald E. Carl, the master of the DB-9, testified that he was in overall charge of defendant's operations in the area.

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[78]See Wallace v. Oceancering Int'l, 727 F.2d 427 (5th Cir. 1984); Litherland v. Petrolane Offshore Const. Services, 546 F.2d 129 (5th Cir. 1977). See also The Murphy Tugs, *supra* note 29, in which Judge Henry Billings Brown treated a diver as a seaman.

[79]See Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983), *cert. den.*, 464 U.S. 1069 (1984).

[80]See Craig v. M/V Peacock, 760 F.2d 953, 957 (9th Cir. 1985) (Wisdom, J., dissenting from denial of unseaworthiness remedy to scientist on ORVA ship and pointing out that such men are often "exposed to greater perils of the sea than are traditional seamen"). See also Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 170 (2d Cir. 1973) (characterizing a beautician on a passenger liner as a seaman and explaining that "the remedies afforded by the Jones Act ... are designed to protect [all] those who perform services upon ships and are exposed to the unique hazards of work upon the sea").

He instructed plaintiff to leave the GATES TIDE and go onto the small platform to check a gas line for leaks. this was not part of plaintiff's regular work, but it was indisputably part of his "foreseeable shore duties."[81] Captain Carl's order to the plaintiff was improvident, because the gas line in question was then being hydrotested, creating the danger of a pressure blowout. It is considered dangerous even to go upon a platform where lines are being hydrotested. The hydrotesting procedure was being implemented and directed by Harold E. Morrell, Sr., working aboard the JARMAC-8. (Morrell testified that *he* was in charge of the operation.) Plaintiff talked by radio with both Carl and Morrell, but was not made aware of the danger of going on the platform and approaching the line. Carl and Morrell did not coordinate their orders and instructions to the plaintiff; Morrell testified that there was no radio contact between the DB-9 and the JARMAC-8. While plaintiff was testing the line, a pressure blowout occurred, injuring plaintiff's head. His injuries were thus the direct result of a failure of communications among vessels at sea.

Third, exposure to a potential tort action by the injured worker obviously gives the seaman's employer a much stronger incentive to reduce or eliminate those dangers than the obligation to carry workers' compensation insurance. This fact has figured prominently in congressional deliberations on the proper treatment of

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[81]Webb v. Dresser Industries, 536 F.2d 603, 607 (5th Cir. 1976), *cert. den.*, 429 U.S. 1121 (1977)(holding that vessel sending seaman ashore in Alaska to pick up supplies was unseaworthy for not furnishing proper boots).

maritime worker injuries.[82]

Fourth, competing tests for defining seamen can usefully be compared by evaluating how well they result in affording the special seamen's protections to the workers who confront those "unique hazards" while denying those protections to other maritime workers. That evaluation is undertaken in the following two sections of this Brief.

7. The Virtues of the Fifth Circuit Test For Seaman Status.

The Fifth Circuit's test for seaman status was set forth in the en banc opinion in *Barrett v. Chevron, USA, Inc.*, as follows:

> There is an evidentiary basis for a Jones Act case to go to the jury: (1) if [in the context of the injured worker's entire employment with his current employer] there is evidence that the injured workman was assigned permanently to a vessel [or to a fleet of vessels, i.e., an identifiable group of vessels acting together or under one control] ... or performed a substantial part of his work on the vessel [or fleet]; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance

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[82]See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., 579-80, 589, 608-09, 816-19 (1972); Longshoremen's and Harbor Workers' Compensation Act, Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess., 249, 298-302, 322-27 (1972).

during its movement or during anchorage for its future trips.[83]

This test has been in place for over thirty years. It routinely excludes seaman status claims by land-based workers who do not confront the unique seamen's hazards.[84] It regularly assigns seaman status to workers who do confront those dangers.[85] The courts using the Fifth Circuit approach occasionally make explicit reference to the worker's

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[83]781 F.2d 1067, 1073 (5th Cir. 1986) (en banc). The quoted test was taken verbatim from Offshore Company v. Robison, *supra* note 76, 266 F.2d at 779. The matter in the first set of brackets was the only change in the *Robison* test wrought by the *Barrett* opinion, 781 F.2d at 1075. The matter in the second set of brackets refers to the *Barrett* court's summary of post-*Robison* cases, *id.* at 1074.

[84]See the discussion and citations in Robertson, *supra* note 1, 64 Tex. L. Rev. at 96-106. Since that article was published seaman status has been denied on the basis of the *Robison/Barrett* test in at least two dozen appellate decisions. See, e.g., Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990) (affirming summary judgment that a maintenance man on a seldom-moved housing barge used exclusively in shallow coastal and inland waters was not a seaman). Other recent appellate decisions using the *Robison/Barrett* test to deny seaman status are summarized in alphabetical order in Appendix B, *infra*. The bulk of these culminated in summary judgment for defendant. Perhaps a more informative test for seaman status--one that made explicit and controlling reference to whether the worker's duties involved significant exposure to the characteristic seamen's dangers--would have informed counsel of the futility of bringing these cases. See Robertson, *supra* note 1, urging such a modification of the Fifth Circuit test. On the other hand, curbing the natural zeal of advocates for injured persons may be beyond the restraining power of words. And in any event no sensible modification of the Fifth Circuit's test could legitimately exclude the present plaintiff-respondent--whose work regularly exposed him to the perils of the sea and to the dangers of vessel movement, and who was hurt in the present instance by a peril of the sea--from seaman status.

[85]See the discussion and citations in Robertson, *supra* note 1, 64 Tex. L. Rev. at 96-106. For more recent decisions see Appendix C, *infra*.

exposure to those dangers as a part of their test for seaman status or as a way of justifying particular applications of their test.[86] Usually they do not.[87] But study of the fact patterns and results of the reported cases confirms that the Fifth Circuit test works reasonably well in delimiting the class of workers who confront the unique seamen's hazards.

8. The Demerits of the Seventh Circuit Test.

The parties to the present case are in rough agreement that most of the circuits approach seaman status questions using the Fifth Circuit test or some minor modification thereof.[88] Only the Seventh Circuit clearly and markedly differs. Defendant-petitioner urges this Court to follow that circuit. In *Johnson v. John F. Beasley Const. Co.*, a panel of the Seventh Circuit acknowledged that Court's relative lack of experience with seaman status issues[89] but went on to create a dramatically new test for seaman status. The *Johnson* decision upheld summary judgment denying seaman status to an ironworker injured when his employer's tug ran into the construction barge on which he was working in the middle of the Illinois River. The court articulated its test for seaman status as follows:

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[86]See text and notes 75-80, *supra*.

[87]See note 84, *supra*.

[88]See Brief for Petitioner at 24-26, showing that "[o]nly the Seventh Circuit has made a frontal assault on [the Fifth Circuit's] *Robison* [test]." See Robertson, *supra* note 1, 64 Tex. L. Rev. at 112-113, arguing that the Third Circuit's decision in Simko v. C&C Marine Maintenance Co., 594 F.2d 960 (3d Cir.), *cert. den.*, 444 U.S. 833 (1979), is broadly consistent with the Fifth Circuit's approach. Petitioner calls *Simko* a "babystep" away from the Fifth Circuit test. Brief for Petitioner 25.

[89]742 F.2d 1054, 1056 (7th Cir. 1984), *cert. den.*, 469 U.S. 1211 (1985).

> [W]e hold that in these equivocal situations there is an evidentiary basis for submitting to the jury the question whether the person was a member of the crew of a vessel at the time of the injury if: (1) the person injured had a more or less permanent connection with a vessel in navigation, and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel."[90]

The *Johnson* test does not work very well.[91] There are at least three things wrong with it. First, it would exclude from the seamen's protections too many workers who confront the characteristic seamen's dangers in the course of their work, all day long and every day. No mission seamen--no diver, no harpooner, no drilling barge roughneck--could ever qualify. Thus it would cut out the workers who are often "exposed to greater perils of the sea than are traditional seamen"[92] and need these protections most.

Second, the *Johnson* test is frontally inconsistent with this Court's decisions in *Senko*, *Gianfala* and *Grimes*;

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[90] *Id.* at 1062-63.

[91] For example, a district judge in the Seventh Circuit recently had to struggle to accord seaman status to a man who worked on and sailed with a fleet of four ferries. Estate of Rainsford v. Washington Island Ferry Line, 702 F. Supp. 718 (E.D. Wis. 1988). The court said the "facts of the case at hand do not lend themselves to an easy application of the Seventh Circuit test", *id.* at 722, was generally critical of that test, and found it necessary to resort to precedents from the Fifth Circuit in order to resolve the question presented. See *id.* at 722-24.

[92] Craig v. M/V Peacock, *supra* note 80, 760 F.2d at 957 (Wisdom, J., dissenting).

almost as clearly inconsistent with *Norton* and *Butler*; and demonstrably inconsistent with the spirit of *Warner* and *Tipton*. In fact, the *Johnson* case seems indistinguishable in any relevant way from the *dissent* in the *Senko* case.[93]

Third, it is somewhat vague and somewhat arbitrary. "Transportation function" was presumably chosen over "navigation function" to facilitate including people like ship's cooks and doctors, "bartenders and musicians on cruise ships, [and] maids and stewards on passenger ships" in the seaman class.[94] But no one can know whether a particular doctor or cook will be deemed to serve the assigned vessel's "transportation function" until litigating the point. And with what justification can it be said that the gourmet cook and the recreation director on a passenger liner serve their vessel's transportation function in a more legitimate sense than the WWI muleteer served the BARON NAPIER's, Queequeg the PEQUOD's, and Jon Wilander the GATES TIDE's? As Judge Learned Hand stated, there can be "in principle no reason"[95] for a rule that would extend the seamen's protections to bartenders and hairdressers while relegating Jon Wilander to the Louisiana workers' compensation statute or the laws of Qatar.

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[93] Defendant-petitioner appears to concede this. See Brief for Petitioner 31-32.

[94] Brief for Petitioner 31, quoting Judge Wisdom's dissent in Craig v. M/V Peacock, *supra* note 80. Defendant-petitioner seems to agree that "transportation function" is meant to include such workers. See Brief for Petitioner at 31-32.

[95] The J.S. Warden, *supra* note 19, 175 F. at 315.

CONCLUSION

Congress, fully aware that the prevailing test for seaman status includes mission seamen like plaintiff-respondent, has not seen fit to amend the law. The test for seaman status applied by the court below has three virtues: (a) It is faithful to this Court's seaman status cases. (b) It is consistent with the pre-Jones Act cases defining "seamen". (c) It does a reasonably good job of fulfilling the policy of the Jones Act by delimiting the class of workers whose work significantly exposes them to the "unique hazards" of seamen's service. The test urged by petitioner fails on all three counts. Therefore this Court should affirm the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A
CHRONOLOGICAL TABLE OF PRE-JONES ACT SEAMAN STATUS CASES.

Shaw v. The Lethe, 21 F. Cas. 1194 (No. 12,721) (Adm. Ct. Pa. 1781): Without comment, a ship's surgeon was treated as entitled to a seaman's lien for wages.

Smith v. The Pekin, 22 F. Cas. 620 (No. 13,090) (E.D. Pa. 1831): Admiralty jurisdiction over a steward's claim for wages was upheld.

U.S. v. Thompson, 28 F. Cas. 102 (No. 16,492) (C.C.D.Mass. 1832): Justice Story, sitting on circuit, held that a cooper on a whaling voyage was a seaman for purposes of statutes penalizing revolt. Justice Story said that "a 'cooper' is a seaman in contemplation of law, although he has peculiar duties on board of the ship. ... A cook and a steward are seamen.... So a pilot, a surgeon, a ship-carpenter, and a boatswain, are deemed seamen...." *Id.* at 102.

Macomber v. Thompson, 16 F. Cas. 337 (No. 8919) (C.C.D.Mass. 1833): Here Justice Story partially allowed the same cooper's libel for wages.

Trainer v. The Superior, 24 F. Cas. 130 (No. 14,136) (E.D. Pa. 1834): The court rejected a libel for wages by musicians aboard a floating museum but stated that "[t]he courts ... have gone a great way in considering services on board of a vessel to be maritime, although, strictly speaking, the persons were not mariners, nor employed in the navigation of the vessel. Their *cooks, carpenters, stewards, and even surgeons have been allowed to sue in the admiralty as mariners* ...." *Id.* at 131; emphasis added.

Allen v. Hallett, 1 F. Cas. 472 (No. 223) (S.D.N.Y. 1849): For purposes of rules penalizing desertion, a cook on an ocean voyage was a seaman. "A cook ships and rates as a seaman.... He has also the privileges of a seaman, as to remedy against the ship for his cure in case of sickness, and his protection aboard if left by the vessel." *Id.* at 473.

Sageman v. The Brandywine, 21 F. Cas. 149 (No. 12,216) (D.Mich. 1852): A female cook had a lien for wages. "A cook on board of a vessel has been held to be a mariner. It matters not whether the cook is a male or female." Id. at 149.

Wolverton v. Lacey, 30 F. Cas. 417 (No. 17,932) (N.D.Ohio 1856): A female steward had a lien for wages. "It is now well determined that the term 'mariner' includes cooks, stewards, carpenters, coopers, and firemen as well as sailors. In fact, *all on board the vessel, employed in her equipment, her preservation, or the preservation of the crew, are denominated 'seamen.'* " *Id.* at 418; emphasis supplied.

The Sultana, 23 F. Cas. 379 (No. 13,602) (D.Mich. 1857): "The clerk of a steamboat is a mariner within the meaning of the law conferring a lien for wages." *Id.* at 379.

The Canton, 5 F. Cas. 29 (No. 2388) (D.Mass. 1858): Persons hired to load a vessel with stones, take her from Quincy to Boston, unload the stones, and use them to construct the wall of a wharf had a lien for wages.

The North America, 18 F. Cas. 339 (No. 10,314) (E.D.N.Y. 1872): A fireman on board a steamer was a seaman, entitled to a lien for wages and to maintenance and cure.

The Ocean Spray, 18 F. Cas. 558 (No. 10,412) (D.Ore. 1876): A group of 24 Indians hired by a vessel to hunt and kill fur seals were seamen entitled to a lien for wages. (So were the Indians' two interpreters.)

The Wanderer, 20 F. 655 (C.C.D.La.1880): A purser was held entitled to a lien for wages.

The Minna, 11 F. 759 (E.D. Mich. 1882): Judge Henry B. Brown held that a man who worked solely as a fisherman on a fishing voyage and who "took no part in the navigation of the vessel" was a seaman entitled to a lien for services.

The Murphy Tugs, 28 F. 429 (E.D. Mich. 1886): Judge Henry B.

Brown held that a deep-sea diver had a lien for wages because, under the principle of *The Minna*, *supra*, "all hands employed upon a vessel ... [are] entitled to a lien, if their services were in furtherance of the main object of the enterprise in which she was engaged." *Id.* at 431.

Saylor v. Taylor, 77 F. 476 (4th Cir. 1896): Workers on a steam dredge had a lien for wages. "[I]n all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners...." *Id.* at 479.

The Carrier Dove, 97 F. 111 (1st Cir. 1899): "Fishermen are seamen" and have a lien for their services. *Id.* at 112.

The J.S. Warden, 175 F. 314 (S.D.N.Y. 1910): Judge Learned Hand held that a bartender on a passenger vessel was a seaman and had a lien for his wages. Judge Hand stated: "I can see in principle no reason why there should be an artificial limitation of [seamen's] rights to those engaged in the navigation of the ship, to the exclusion of others *who equally further the purposes of the voyage*...." *Id.*at 315; emphasis added.

U.S. v. Atlantic Transport Co., 188 F. 42 (2d Cir. 1911): "Horsemen, signed for service on a vessel in caring for horses during a voyage, [were] 'seamen'" for purposes of immigration acts. *Id.* at 42 (headnote).

The Virginia Belle, 204 F. 692 (E.D. Va.1913): Engineer on small fishing boat had seaman's lien for wages.

The Buena Ventura, 43 F. 797 (S.D.N.Y. 1916): A wireless telegraph operator on an ocean vessel was a seaman and had a lien for maintenance and cure. "[E]very one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage." *Id.* at 799.

The Baron Napier, 249 F. 126 (4th Cir. 1918): On a vessel

conveying mules to the Allies in Egypt a muleteer, whose "duties had only to do with the care of the mules, and were in no way connected with the navigation of the ship", was a seaman under the 1915 statute granting a negligence action. *Id.* at 127.

The Hurricane, 2 F.2d 70 (E.D. Pa. 1924): "Chief operator" and "dipper tender" on dredge were seamen entitled to a lien for wages.

The Sea Lark, 14 F.2d 201 (W.D. Wash. 1926): Members of orchestra on excursion boat were seamen, entitled to a lien for wages.

APPENDIX B
RECENT COURT OF APPEAL DECISIONS DENYING SEAMAN STATUS ON THE BASIS OF THE FIFTH CIRCUIT'S ROBISON/BARRETT TEST.

1.Cases Affirming Summary Judgment That P Was Not a Seaman:

Ardleigh v. Schlumberger Ltd., 832 F.2d 933 (5th Cir. 1987): Itinerant wireline operator who did short jobs on a variety of vessels and platforms.

Ducreport v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393 (5th Cir. 1989): Shorebased ship repairer.

Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990): Maintenance man on seldom-moved housing barge used exclusively in shallow coastal and inland waters.

Johnson v. ODECO Oil and Gas Co., 864 F.2d 40 (5th Cir. 1989): Worker assigned to stationary offshore oil production platform and storage facility.

Ketnor v. Automatic Power, Inc., 850 F.2d 236 (5th Cir. 1988): Service technician whose job was to check and repair navigational aids (lights and horns) on oil and gas wells in the Gulf of Mexico and Louisiana inland waters.

King v. Universal Elec. Construction, 799 F.2d 1073 (5th Cir. 1986): Electric construction lineman killed building a line across a navigable river.

Langston v. Schlumberger Offshore Services, Inc., 809 F.2d 1192 (5th Cir. 1987): Very similar to *Ardleigh*, *supra*.

Lirette v. N.L. Sperry Sun, Inc., 831 F.2d 554 (5th Cir. 1987): Very similar to *Ardleigh*, *supra*.

Lormand v. Superior Oil Co., 845 F.2d 536 (5th Cir. 1987), *cert. den.*, 484 U.S. 1031 (1988) (Justices White and Blackmun dissented from the denial of certiorari): Welder who spent about 15% of his work time on offshore special purpose vessels and the rest on land.

New v. Associated Painting Services, Inc., 863 F.2d 1205 (5th Cir. 1989): Sandblaster/painter, assigned willy-nilly to short jobs on a variety of vessels and stationary platforms.

Reynolds v. Ingalls Shipbuilding Div., 788 F.2d 264 (5th Cir.), *cert. den.*, 479 U.S. 885 (1986): Shipfitter hurt during sea trials.

Smith v. Nicklos Drilling Co., 841 F.2d 598 (5th Cir. 1988): Mechanic, formerly assigned to barge, but shortly before injury permanently reassigned to land rig.

Waguespack v. Aetna Life & Cas. Co., 795 F.2d 523 (5th Cir. 1986), *cert. den.*, 479 U.S. 1094 (1987): Worker whose job was to handle the covers of grain barges in unloading slip.

Williams v. Weber Management Services, Inc., 839 F.2d 1039 (5th Cir. 1987): Barge repairman.

2. Cases Culminating In Denial of Seaman Status In Other Procedural Contexts:

Chauvin v. Sanford Offshore Salvage, Inc., 868 F.2d 735 (5th Cir. 1989): Affirms bench trial judgment denying seaman status to worker on derrick barge used to move equipment from salvage yard to dock.

Daniel v. Ergon, Inc., 892 F.2d 403 (5th Cir. 1990): Reverses trial judge for failing to give summary judgment or directed verdict against seaman status of man who cleaned barges moored to river bank.

Garrett v. Dean Shank Drilling Co., Inc., 799 F.2d 1007 (5th Cir. 1986): Reverses trial judge for failing to give summary judgment or directed verdict against seaman status of roustabout hurt building a drilling rig on a barge moored in navigable water.

Graham v. Milky Way Barge, Inc., 824 F.2d 376 (5th Cir. 1987): Upholds judgment on jury verdict denying seaman status to painter/sandblaster assigned to a fixed offshore platform and housed on an auxiliary vessel.

Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc., 830 F.2d 1392 (5th Cir. 1987): Affirms directed verdict denying seaman status to switcher who did short jobs on many offshore platforms, being ferried among them by "maritime taxi".

Miller v. Patton-Tully Transp. Co., Inc., 851 F.2d 202 (8th Cir. 1988): Affirms bench trial judgment denying seaman status to dozer operator on riverbank stabilization project who sometimes worked on barges at the bank.

Miller v. Rowan Companies, 815 F.2d 1021 (5th Cir. 1987): Affirms judgment NOV denying seaman status to fishing tool supervisor assigned to a fixed platform, who ate and slept on auxiliary vessel.

Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986): Affirms judgment on jury verdict denying seaman status to torque wrench operator who sometimes worked on land and sometimes on drilling barges, and who was hurt on a drilling barge in Galveston Bay.

APPENDIX C
RECENT COURT OF APPEAL DECISIONS UPHOLDING SEAMAN STATUS.

Complaint of Patton-Tully Transp. Co., 797 F.2d 206 (5th Cir. 1986): Affirms bench trial judgment affording seaman status to a worker assigned to a fleet of vessels operated on the Mississippi River by a timber-hauling and river salvage company.

Leonard v. Dixie Well Service & Supply, 828 F.2d 291 (5th Cir. 1987): Reverses summary judgment that had denied seaman status to a man who testified he spent 70% of his work time on an offshore drilling vessel.

Petersen v. Chesapeake & Ohio Ry. Co., 784 F.2d 732 (6th Cir. 1986): Affirms judgment on jury verdict affording seaman status to a machinist who worked on a fleet of car ferries sailing between Great Lakes Ports.

Pickle v. International Oilfield Divers, 791 F.2d 1237 (5th Cir.), *cert. den.*, 479 U.S. 1059 (1986) (Justice White and Chief Justice Rehnquist dissented from denial of certiorari): Affirms bench trial judgment affording seaman status to deep-sea diver assigned to barge.

Smith v. Odom Offshore Surveys, 791 F.2d 411 (5th Cir. 1986): Affirms bench trial judgment affording seaman status to member of Mississippi River hydrographic survey crew (defendant had not designated its vessels under the procedure set forth in ORVA, *supra* text and notes 72-74).

Thibodeaux v. Torch, Inc., 858 F.2d 1048 (5th Cir. 1988): Reverses summary judgment that had denied seaman status to a crane operator assigned to an offshore pipelay barge.